

Protest of)
) Date: December 5, 1990
BARBER-COLMAN COMPANY)
)
Solicitation No. 199986-90-A-0006) P.S. Protest No. 90-34

DECISION

Barber-Colman Company ("Barber-Colman") protests the award of a contract for an energy management system to Johnson Controls, Inc. ("JCI")^{1/} Barber-Colman argues that the award of the contract was improper because: 1) JCI's proposal should not have been accepted; 2) JCI's proposal was incomplete and misleading; 3) JCI's proposal was technically deficient; and 4) Barber-Colman offered the lowest price.

Solicitation No. 199986-90-A-0006 was issued by the Facilities Service Office, Overland Park, Kansas, on December 18, 1989, seeking offers for an energy management system^{1/} to be installed in the St. Louis Main Post Office. Proposals were due February 2, 1990, but Amendment Nos. A01 and A02, dated January 12 and February 8 respectively, extended the proposal due date to February 23.

The evaluation criteria in the solicitation, defined in Section M-Evaluation and Award Factors, provide that award will be made to the responsible offeror whose proposal is the most advantageous to the Postal Service when cost/price and other factors are considered. Section M.2b provides, "Cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price."

Section M.2 also requires the proposers to include in their proposals information regarding "Related Project Experience." Under part "f" of this section, each company must "[p]rovide a summary of company workload, currently and for the past two years."

The solicitation identifies certain of the items called for by the solicitation by brand-name. Section K.5 allows proposers to offer "equal" products if such products are clearly identified and are determined to be equal in all material respects to the brand-name products referenced in the solicitation. Evaluation of proposals offering equal products and the determination as to equality of the products offered are to be based

^{1/}Barber-Colman's original protest was dated June 28, 1990. Barber-Colman also submitted supplemental comments dated September 6 and September 21 alleging additional grounds for protest.

^{2/}The energy management system consists of a host computer, (Network Control Unit) and Global Control Units located along a local area network (LAN) through which the host computer communicates with the Field Control Units. The Field Control Units, in turn, control various devices in the building such as air handling units, lighting, variable air volume terminals, heat pumps, etc. The system required Field Control Units at 72 locations throughout the building.

on information furnished by the offeror or identified in the proposal, as well as other information reasonably available to the Postal Service.

In response to the solicitation, Barber-Colman, listed in the specification as an "acceptable manufacturer," submitted detailed specifications for the Barber-Colman Network-8000 System ("Network-8000"). JCI was not listed as an acceptable manufacturer in the original specification,^{1/} but offered its Metasys Network Control Unit ("Metasys System") as an "equal" product. Pursuant to the procedures specified in Section K of the solicitation, after receipt of offers the Postal Service visited JCI in Milwaukee, Wisconsin, on March 28, to allow JCI to demonstrate the technical capability of its Metasys System. As a result of the demonstration, the Metasys System was added to the list of acceptable brand-name products meeting the minimum requirements for certain of the units identified in the solicitation in the Request for Best and Final Offers (BAFO) dated April 12. The Postal Service did not visit the sites of the firms which were already listed as acceptable manufacturers in the solicitation.

The technical evaluation of the offers resulted in a competitive range of three firms, including Barber-Colman and JCI. Although each firm was found to be technically qualified to complete the project, none of the proposed systems met the project specifications exactly as written. Campbell Design Group, the Postal Service's consulting engineers, therefore, revised the technical specifications around the proposals submitted by the firms, conducting extensive discussions with the firms, so that the April 12 BAFO reflected the three acceptable systems which had been proposed. The BAFO specifications set forth exactly which products could be offered to meet the solicitation requirements. Page 3 of the BAFO request stated the following:

1. System products which meet the minimum requirements for a global/network control unit (GCU) are limited to the following:
 - a. Andover Controls ACNET Local Control Unit (LCU).
 - b. Barber Colman NETWORK 8000 Global Control Module (GCM).
 - c. Johnson Controls Metasys Network Control Unit (NCU).
2. System products which meet the minimum requirements for a field control unit (FCU) are limited to the following:
 - a. Andover Controls ACNET Local Control Unit (LCU).
 - b. Barber Colman NETWORK 8000 Local Control Module (LCM).
 - c. Johnson Controls Metasys Application Specific Controller (ASC) or Air Handling Unit (AHU) Controller.^{1/}

^{3/}Section 3.9, page 61 of the technical specifications.

^{4/}JCI's product literature describes the ASC as designed to control and monitor a specific aspect of the facility's operation such as: air handling units, lighting, etc. Each ASC integrates the hardware, electronics, software, sensors and control devices. The AHU Controller is described as a flexible control system designed specifically for the most common air handling schemes, including single zone, dual duct, and variable air volume.

The BAFO request also included a requirement for additional technical information on the proposed systems.

Best and final offers were due April 20. Barber-Colman requested a short time extension to assemble its data, which was granted by the contracting officer. Barber-Colman failed to submit required additional technical information with its proposal, and the contracting officer requested the information on April 30, and received it on May 3.

The information received from all offerors in response to the BAFO request was reviewed by the Campbell Design Group. Review of the technical information submitted by Barber-Colman disclosed that it had substituted products for those listed in the April 12 request for BAFO. Barber-Colman's LCM was the only product listed for Barber-Colman that would meet the minimum requirements for a field control unit, yet Barber-Colman offered its Microzone II unit, which was not listed as satisfying the specifications, in lieu of its LCM in 67 out of 72 locations in its BAFO.

Barber-Colman's was the lowest priced offer. However, the contracting officer, upon Campbell Design Group's recommendation that Barber-Colman's proposal be rejected as "nonresponsive,"^{1/} rejected Barber-Colman's offer. The contracting officer concluded that JCI's BAFO complied with the revised specifications in the request for BAFO and was the next-lowest as to cost/price. JCI also met the general standards of a responsible contractor. The contract, therefore, was awarded to JCI on June 13, in the amount of \$959,044.

In its June 28 protest, Barber-Colman alleges that JCI should not have been allowed to submit a proposal at all since it was not originally included as an "acceptable manufacturer;" moreover, JCI misled the Postal Service as to its "related project experience."^{1/} Barber-Colman challenges JCI's ability to meet the technical specifications of the solicitation. Finally, Barber-Colman asserts that it should be awarded the contract because it submitted the lowest price.

JCI submitted comments in support of the contract award, contending that it properly submitted a proposal for an "equal" product under section K of the solicitation which was subsequently deemed acceptable by the Postal Service. JCI disputes Barber-Colman's contention that JCI misled the Postal Service as to its related project experience and has submitted for the record a list of sites where the Metasys System is

^{5/}We note that Campbell Design Group has used incorrect terminology in labeling Barber-Colman's proposal "nonresponsive." All postal solicitations are now conducted on a negotiated basis; as such, proposals are evaluated to determine technical acceptability or unacceptability. See Procurement Manual (PM) 4.1.4. "Responsiveness" and "nonresponsiveness," relevant to sealed-bid solicitations, are no longer proper terms to use in evaluating proposals under Postal Service procurements. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990. See CFI, P.S. Protest No. 88-82, February 17, 1989. Barber-Colman's proposal therefore was deemed "technically unacceptable."

^{6/}JCI submitted 8 pages listing computerized facilities management systems installed or under contract in the region with its original proposal. None of the systems listed was a Metasys System, and Barber-Colman concludes therefrom that the Metasys System remains in the testing stage.

presently on-line.¹⁴ JCI defends the technical acceptability of the Metasys System. Finally, JCI argues that Barber-Colman's contention that Barber-Colman should receive award as the low-price offeror is incorrect for two reasons: 1) Barber-Colman did not comply with the specifications, and 2) price is not dispositive in negotiated procurements which set forth their own evaluation criteria.

JCI also argues that since the protester's BAFO did not meet the specifications, Barber-Colman is not in line to receive the award even if the protest were sustained and that, therefore, it is not an "interested party" and lacks standing to protest this award. JCI also contends that the protest is untimely because it amounts to an attack on the solicitation under PM 4.5.4 c. and should have been filed no later than the next closing date for receipt of proposals.

The contracting officer submitted a report detailing the circumstances surrounding the solicitation and subsequent protest. In response to comments made by the protester, the contracting officer later sent this office a report dated October 26, submitted by Campbell Design Group addressing specific allegations made by the protester as to the evaluation process.

Barber-Colman submitted supplemental comments on September 6 and 21. The supplemental comments address grounds for protest that were not raised in its June 28 protest: 1) Campbell Design Group and the contracting officer mistakenly based their evaluation of Barber-Colman's proposal on specification data for the Microzone instead of the Microzone II; 2) the Microzone II complies with the performance specifications of the solicitation; 3) the competitive baseline was upset both because Barber-Colman was restricted by the solicitation to offering its LCM whereas JCI could offer either its ASC or AHU, and because the Postal Service made a site visit to JCI and not to Barber-Colman; 4) the energy management system offered by Barber-Colman is superior to and cheaper than that offered by JCI, and therefore it is in the best interests of the Postal Service to award the contract to Barber-Colman. The only ground common to the June 28 protest and Barber-Colman's supplemental comments is that the JCI Metasys System is technically deficient. Barber-Colman also attempts in these supplemental comments to refute the standing and timeliness arguments made by JCI.

Both Barber-Colman and JCI participated in protest conferences with this office pursuant to PM 4.5.7 j. At its conference, Barber-Colman's main focus was the technical adequacy of the Microzone II. JCI argued that the contracting process had been fairly and properly conducted and that the competition had produced the best result for the Postal Service. The procedural arguments of standing and timeliness were reiterated.

¹⁴The Postal Service's evaluation of initial offers recognized the newness of the Metasys System, indicating that the Postal Service was not misled as to JCI's related project experience.

Discussion

We first address the issue whether Barber-Colman has standing to bring this protest. Next, the issues in the first protest are evaluated as to timeliness. Finally, the additional bases for protest are evaluated as to timeliness.

Procurement Manual 4.5.2 vests this office with jurisdiction to decide protests where the protester is an "interested party." Generally, "interested party" has been interpreted to mean that a party must be eligible for award if its protest were upheld. York International Corporation, P.S. Protest No. 89-77, January 19, 1990; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985. Thus we address whether Barber-Colman would be in line for award if its protest were sustained.

"Each proposal must be examined to determine whether it meets the requirements of the solicitation." PM 4.1.4 c. "[A] proposal that does not meet the solicitation requirements is technically unacceptable." Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990, quoting T&S Products, P.S. Protest No. 90-12, May 30, 1990.

The contracting officer and Campbell Design Group evaluated the Microzone II for technical compliance and concluded that the Microzone II does not meet the specifications in three areas: 1) the Microzone II does not have hand-off-auto switches on controlled outputs; 2) the Microzone II does not provide stand-alone adaptive PID control; and 3) the Microzone II does not have the specified analog-to-digital conversion resolution/accuracy.

"This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations." Lista International Corporation, supra, quoting T&S Products, supra. In this case there has been no indication that the contracting officer's determination that the Microzone II^{1/} was technically unacceptable was arbitrary or in violation of procurement regulations.^{1/} Additionally, in a factual dispute we adopt the contracting officer's position absent sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's action. Air Transport Association of America, P.S. Protest No. 90-02, March 23, 1990, citing Harper's Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976; Alta Construction Co., P.S. Protest No. 85-2, February 26, 1985; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986.

Since Barber-Colman's BAFO was not technically acceptable, Barber-Colman is not in line for award should its protest succeed. Accordingly, Barber-Colman thus lacks

^{8/}Although there may have been some initial confusion between the Microzone and Microzone II, it is clear the contracting officer evaluated the Microzone II.

^{9/}Even if we disagreed with the contracting officer's evaluation of the technical acceptability of the Microzone II, the contracting officer would have been justified in rejecting the Microzone II since it was not listed in the April 12 BAFO request as a product which met the minimum requirements for a field control unit and therefore could not be offered. See TLT Construction Corp., Inc., supra.

standing to challenge the basis on which JCI's proposal was evaluated. Although Postal Service decisions have not addressed whether a protester whose offer was found technically unacceptable may subsequently protest issues other than the evaluation of its own offer, Comptroller General decisions have reached the issue.^{10/} The Comptroller General has held that where a proposal has been properly determined technically unacceptable, and there are other acceptable offerors in line for award, the protester is not an interested party to challenge the award decision. ISC Defense Systems, Inc., Comp. Gen. Dec. B-236597.2, January 3, 1990, 90-1 CPD &8.^{11/} We adopt this rule and find Barber-Colman does not have standing to challenge the evaluation of JCI's proposal.

Even if Barber-Colman had standing, its protest would be untimely. This office lacks authority to decide any protest which has been untimely filed. Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990. See, e.g., International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983 (collecting cases). Procurement Manual 4.5.4 c. states,

Protests of alleged deficiencies in the solicitation after the receipt of initial proposals must be received not later than the next closing date and time for the receipt of proposals.

The first, second and third bases of protest^{11/} in Barber-Colman's June 28 protest are untimely because they are protests of the solicitation, and must have been filed before final proposals were due. The fact that the Metasys System had been determined to be technically acceptable was readily apparent from the face of the April request for BAFOs since it listed JCI's Metasys System as meeting the minimum requirements for both the global/network control and field control units. See Wayne S. Davis, P.S. Protest No. 90-54, October 18, 1990; Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990. Under PM 4.5.4 c. the protest is untimely since it was not filed until after the date set for receipt of Best and Final Offers had passed. See

^{10/} While Comptroller General decisions are no longer binding on the Postal Service by virtue of the Postal Reorganization Act, 84 Stat. 719, such decisions are entitled to consideration to the extent they interpret statutes binding on the Postal Service or regulations similar to those adopted by the Postal Service.

Triner Scale and Manufacturing Company, P.S. Protest No. P 75-65, September 19, 1975. (citations omitted)

^{11/} See also Titan Roofing, Inc., Comp. Gen. Dec. B-236236.2, January 10, 1990, 90-1 CPD &39 (nonresponsive bidder not an interested party because not eligible for award) Propper Manufacturing Co., Inc.; Columbia Diagnostics, Inc., Comp. Gen. Dec. B-233321, B-233321.2, January 23, 1989, 89-1 CPD &58 ("Given the nonresponsiveness of Propper's bid, we need not consider the propriety of the contracting officer's decision to cancel the solicitation since we conclude that Propper is not an "interested party" under our Bid Protest Regulations. . . .") A "nonresponsive" bid is similar to a technically unacceptable offer for our purposes here.

^{12/} 1) JCI's proposal should not have been accepted; 2) JCI's proposal was incomplete and misleading; 3) JCI's proposal was technically deficient.

Huntington Laboratories, Inc., P.S. Protest No. 89-46, November 15, 1989. Likewise, Barber-Colman's fourth basis of protest alleging it should receive award as the low-price offeror is untimely. In negotiated procurements, awards are not required to be made solely on the basis of lowest price (York International Corporation, *supra*, n.6; citing International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989) and the solicitation clearly advised offerors of this fact, as well as of the evaluation criteria to be used.

The new issues raised in supplemental comments to the protest filed on September 6 and September 21 must independently meet timeliness requirements. Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986, *aff'd on reconsideration*, June 9, 1986 ("Submissions in the course of a bid protest which establish new and independent bases for protest must independently meet the timeliness requirements set out in the protest regulations.").

The Postal Service's regulations, however, require protests to be filed not later than ten working days after the relevant information is known or should have been known, "provided that no protest will be considered if received more than 15 working days after award of the contract in question." PM 4.5.4 d.

Barber-Colman contends that it waited until September to protest the additional issues raised because it had no knowledge of the facts giving rise to the issues later protested until it received the contracting officer's report on August 16. Barber-Colman's comments cite two Comptroller General decisions for the proposition that a competitor has the right to assume an agency will act lawfully and correctly, and that only when a competitor actually learns that errors have been made does it become obliged to file its protest.

We need not deal with Barber-Colman's contentions in this regard since its September 6 and September 21 protests are untimely even under Barber-Colman's theory, since they were provided more than ten working days after Barber-Colman received the contracting officer's report. See Jindal Builders and Restoration Corporation, P.S. Protest No. 90-18, June 19, 1990; USA 800, Inc., P.S. Protest No. 89-90, February 15, 1990; AHJ Transportation, Inc., P.S. Protest No. 89-03, March 16, 1989.

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised. Omnicopy, Inc., P.S. Protest No. 84-24, June 25, 1984; Southern California Copico, Inc., *supra*. We have no authority to waive or disregard the timeliness issue in a particular case. POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985.

This protest is dismissed.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/4/93]